APPENDIX

(Opinion of the Supreme Court of Oklahoma, *In re* C. E. Owens, et al., *vs.* Oklahoma Turnpike Authority, Nos. 35435 and 35632; filed Dec. 7, 1954.)

(Filed in Supreme Court of Oklahoma, Dec. 7, 1954; Andy Payne, Clerk.)

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Nos. 35,435 & 35,632

C. E. Owens, Mrs. C. E. Owens, O. O. Owens and Nabob Oil Company, Plaintiffs in Error,

vs.

Oklahoma Turnpike Authority, Defendant in Error.

SYLLABUS

1. An order setting aside the report of commissioners in condemnation proceedings, and directing a new appraisement is interlocutory and not final, and an appeal will not lie therefrom.

2. When the Oklahoma Turnpike Authority has selected and designated a route for the construction of a turnpike lawfully authorized to be built, the courts of the state will not inquire into the matter for the purpose of determining why some other route was not chosen.

3. The extent of the range of inquiry to be permitted regarding the value of the property taken or damaged in eminent domain proceedings is largely in the discretion of the trial court, and the action of the trial court in admitting or excluding evidence as to value will not be disturbed unless there has been an abuse of such discretion.

[OPINION.]

Appeal from the District Court of Creek County, Oklahoma, Hon. Kenneth Hughes, Judge.

Action to acquire property by condemnation brought by Oklahoma Turnpike Authority against C. E. Owens, et al. From an order setting aside report of commissioners and directing a new appraisement, defendants appeal in cause No. 35,435. From a jury verdict resulting in a decrease of amount of commissioners' award, defendants appeal in cause No. 35,632.

Appeal in cause No. 35,435 dismissed.

Judgment in cause No. 35,632 affirmed.

Young, Young & Young, Sapulpa, Oklahoma, and O. O. Owens, per se, Tulsa, Oklahoma, For Plaintiffs in Error;

Robinson, Shipp, Robertson & Barnes, Oklahoma City, Oklahoma, For Defendant in Error.

Of Counsel: Leon Shipp, Wm. L. Robertson, Oklahoma City, Oklahoma.

Williams, J.,

This is an action in condemnation brought by Oklahoma Turnpike Authority hereinafter referred to as plaintiff, against C. E. Owens, Mrs. C. E. Owens, O. O. Owens and Nabob Oil Company, hereinafter referred to as defendants, concerning approximately 35 acres of rural land situated in Creek County, Oklahoma, taken by plaintiff for construction of the Turner Turnpike. Three different Boards of Commissioners were appointed and filed their reports. The report and award of the first such board, in the amount of $3,170.00, was vacated by the trial court for the reason that two of the defendants were not parties to the action at the time of the appointment. The second such board was appointed and filed a report assessing the award to be paid to defendants at $5,163,250.00. Plaintiff filed a motion to vacate such award and for appointment of new commission-

ers, which was sustained by the trial court and a third such board was appointed. Defendants have appealed from this action of the court in cause No. 35,435. Such appeal must be dismissed, however, since it is an attempt to appeal from an interlocutory order. We *we* said in the syllabus in the case of City of Eufaula v. Ahrens, 58 Okl. 180, 159 P. 327.

> "An order setting aside the report of Commissioners appointed to view the property and assess damages sustained by property owners in condemnation proceedings, and directing a new appraisement is interlocutory and not final, and an appeal will not lie therefrom."

The third Board of Commissioners filed a report assessing the compensation to be paid defendants at $40,000. Defendants filed a motion to vacate the third award, which was overruled, the award was confirmed and the matter set for trial by jury on the amount of the compensation. The jury trial resulted in a verdict fixing the compensation at $23,500.00. Judgment was rendered for plaintiff in the amount of $16,600.00, the difference between the amount of the commissioner's award previously paid into court and the jury's verdict, and defendants' appeal from that judgment in cause No. 35,632. Defendants' appeal pertains to both the question of the right to condemn and the question of the adequacy of the award, and several contentions are advanced in connection with these questions.

In their first proposition, defendants contend that they were denied a forum in which to present the question of the reasonable necessity of taking the property involved in this proceeding. The record reveals, however, that defendants were heard at length by the trial court on several occasions and certainly were not denied a hearing or a forum. The real basis for defendants' complaint seems to be the action of the trial court in excluding certain evidence offered by defendants. Defendants say that the court's refusal of this offer of evidence constituted a denial of a hearing and of due process. A review of the record reveals that the excluded evidence pertained to the availability of another

route for the construction of the turnpike in lieu of the one chosen. The trial court quite properly refused to admit such evidence. Defendants did not contend that the amount of land sought to be condemned was excessive nor did they raise any issue as to the character of the use to which the property sought is to be subjected. Defendants merely contended that the route selected for the turnpike could have been changed in such a manner as to entirely miss the property herein involved and require the use of other property instead. They, in fact, asked the trial court to require plaintiff to change the route of the turnpike to one selected by defendants. The trial court properly refused such request, and excluded the evidence offered by defendants pertaining to the availability and desirability of a route other than the one selected by the Turnpike Authority. In this the court did not err. The same question was before this court in the case of Bilby v. District Court of Ninth Judicial District, 159 Okl. 268, 15 P. 2d 38, wherein we said in the body of the opinion therein:

> "The first statement made in their brief is: 'The land owners demanded the right to show that there was no necessity for condemning the right of way for the reason that there was a section line paralleling the land sought to be condemned and that the owners had offered to give the land on the section line to the State with any additional land necessary on either side of the section line which the state might require to be used as a road.'
>
> "The rule is well settled in this state and most other that the question of necessity in such cases is not a judicial question, but is for the Legislature. Arthur v. Choctaw County Comm'rs, 43 Okl. 174, 141 P. 1; State, ex rel. Dabney, Attorney General, v. Johnson, 122 Okl. 241, 254 P. 61; Hennen v. State, ex rel. Short, Atty. Gen., 131 Okl. 29, 26 P. 636."

And also in the opinion in the case of City of Tulsa v. Williams, 100 Okl. 116, 227 P. 876, we said:

"There is no doubt that the law of eminent domain authorizes the petitioner to fix the situs of its water reservoir. It is entitled to a water supply, and has a right to procure it from any available source. When the city government has chosen the situs for a reservoir, the courts of the state will not inquire into the matter for the purpose of demanding why some other situs was not chosen."

The same rule is applicable here. Where the Oklahoma Turnpike Authority has selected and designated a route for the construction of a turnpike lawfully authorized to be built, the courts of this state will not inquire into the matter for the purpose of demanding why some other route was not chosen.

As their second proposition, defendants contend that the trial court erred in denying defendants the right and leave to offer all their evidence of highest adaptable use and value of the property involved and in limiting the proper measure of damage to condemnees. Defendants' contention in regard to this proposition is somewhat difficult of ascertainment. We do not understand just how defendants could be said to have been denied the right to offer their evidence and we do not find anything in the record to indicate that they were so denied. We conclude that defendants' contention must be directed toward the correctness of the court's ruling on the admissibility of the testimony offered by them. In argument in support of this proposition, defendants state in their brief:

"The trial court persistently denied defendants the right and leave to offer their all expert testimony of the destructive effect of constructing the toll road, * * *"

and also state:

"The trial court throughout the jury trial arbitrarily sustained Turnpike's many objections to defendants' introducing competent evidence showing the

highest adaptable use of defendants' property and project as a unit."

Fairly similar argument is dealt with in our treatment of the second portion of defendants' fifth proposition. Moreover, we do not consider that the portion of defendants' brief dealing with this proposition complies with rule 15 of this court insofar as such rule provides:

> "Where a party complains of the admission or rejection of testimony, he shall set out in his brief the testimony to the admission or rejection of which he complains, stating specifically his objections thereto."

We therefore decline the invitation to search the record in order to discover each instance in which the trial court sustained an objection and then determined whether each such ruling was correct or erroneous. Furthermore, we are committed to the rule that the extent of the range of inquiry to be permitted regarding the value of the property taken or damaged in eminent domain proceedings is largely in the discretion of the trial court, and the action of the trial court in admitting or excluding evidence as to value will not be disturbed unless there has been an abuse of such discretion. City of Tulsa v. Horwitz, 131 Okl. 63, 267 P. 852; State, ex rel. City of Ardmore, v. Winters, 195 Okl. 243, 156 P. 2d 798; City of Enid v. Moyers, 196 Okl. 470, 165 P. 2d 818. We have reviewed the lengthy record of trial in this case and are of the opinion that there was no abuse of such discretion here.

Defendants' third proposition of error is stated by them as follows:

> "Where a duly appointed and qualified Board of Commissioners in a condemnation proceeding has appraised condemnees' property, has filed its report awarding compensation and damages as directed by the order of the court, and, after condemnor has filed exceptions and objections thereto and motion to vacate such report, both condemnor and condemnees have appealed from the award and demanded a jury trial, the

court is without jurisdiction and authority to ignore the demands for jury trial and to sustain condemnor's previously filed motion to vacate; and the judge is also without jurisdiction and authority to appoint and instruct a 'new' Board of Commissioners; and the court erred in sustaining condemnor's motion and as trial judge erred in appointing and instructing the 'new' commissioners without any legal reason—and the court erred in confirming the 'new' Commissioners' Report."

We find no merit in such proposition for several reasons. In the first place, the trial court did not ignore the demands for a jury trial. On the contrary, the record reveals that the trial court acceded to the demands for a jury trial and set the case for trial on the jury docket at the earliest possible date, such jury trial was actually had and this appeal is prosecuted therefrom. The record further reveals that the only parties objecting to such jury trial or attempting to prevent the same were the defendants. Defendants will not now therefore be heard to complain that they were denied a jury trial. The rest of defendants' third proposition we regard as immaterial and moot. Since the Commissioners' award was superseded by the jury verdict, it is of no moment whether the court erred in appointing and instructing the new commissioners or not.

In their fourth proposition defendants contend that the court erred in refusing to vacate the last commissioners' award. We note that in this proposition defendants contend that the trial court should have done the very thing which they contend in their third proposition the court had no jurisdiction or authority to do. We regard the answer as being the same in both instances, however. Since the jury verdict superseded the commissioners' award, the question of the correctness of the commissioners' award has become immaterial and moot.

Defendants' fifth proposition concerns a number of alleged errors lumped together under one proposition. Their first contention under this proposition is that certain re-

marks of the trial court in rebuking counsel prevented a fair trial. This contention is based on three different incidents which occurred during the progress of the trial. In the first incident the trial judge made the following remark:

> "I will sustain that objection to that, without the making of an objection. That is about the fourth time you asked the same question. I don't want you to do it any more."

In the second incident the remark of the trial court concerning which complaint is made was:

> "I don't want to know the description and don't argue that before the jury."

In the third incident complained of the record reveals that after counsel for defendants attempted to argue with the court the trial judge made the following statement:

> "Don't argue with me, Mr. Young. I don't want any back lip out of you. I don't want any argument from counsel in front of the jury."

Defendants demanded a mistrial after each of the above mentioned incidents, which was denied on each occasion, and now contend that as a result they were deprived of a fair trial. We find no merit in such contention. Defendants cite as authority for their contention the line of cases holding that the trial judge should refrain from commenting on, or indicating an opinion in the presence of the jury as to the merits of the case or the truth or falsity of the testimony, such as Settle v. Crawford, 155 Okl. 291, 9 P. 2d 38; Central Fire Ins. Co. of Baltimore v. Smith, 188 Okl. 203, 107 P. 2d 361, and other cases of a similar nature. We find no fault with the cases cited, except that they are not applicable here. There is nothing in the remarks of the trial judge above quoted which indicates a preference for one or the other of the litigants, or includes an expression of opinion upon the merits of the controversy or an opinion concerning the truth or falsity of the testimony presented

to the jury. While the last quoted remark of the trial judge may not have been in the best of taste, there is nothing in it or the other quoted remarks, which materially affected the substantial rights of defendants. As we said in the case of Empire Oil & Refining Co. v. Fields, 188 Okl. 666, 112 P. 2d 395,

> "Improprieties or irregularities in the conduct of a judge are fatal, however, only where there is such departure from proper and orderly method of disposing of the action that the substantial rights of a party are materially affected. The manner of emphasis or force of expression of a judge that cannot be reasonably interpreted to express a wrong opinion as to the law or facts, or to express an opinion of a fact which should be left wholly to the jury, cannot be assigned as error, so mere decisiveness or abruptness of manner is not necessarily objectionable, nor is impatience, discourtesy, or bad manners, provided the essentials of sound judicial conduct are not violated, and complaint cannot ordinarily be made of the tone of voice used by the judge, unless some actual error is committed. 64 C. J. 102, Sec. 107. See also 26 R. C. L. 1028, Sec. 29."

As a further part of the same proposition, defendants assert that all evidence material to the issue must be admitted and then state that the case-made is replete with instances of the trial court's excluding competent testimony. This is in effect a repetition of defendants' second proposition, hereinabove disposed of. It is further stated in this proposition that the court sustained 205 objections made by plaintiff to testimony offered by defendants. A review of the record reveals that many of the objections were sustained on the grounds that the particular witness was not shown to be qualified to answer the particular question, and others were sustained on the grounds that the question called for a conclusion on the part of witness. No where in the briefs do defendants demonstrate the incorrectness of such rulings on the grounds given and we find no error therein. Still other objections were sustained on the grounds

of incompetency, irrelevancy or immateriality, and a review of the record reveals that in most of such instances the trial court's ruling was correct. As previously stated, we find no such abuse of discretion on the part of the trial court in its rulings as would require reversal of the cause.

As a still further part of their fifth proposition defendants state that guess work and conjectural or hearsay testimony of incompetent witnesses must be excluded. They then argue that a careful study of the testimony of all three expert witnesses for plaintiff shows each witness' testimony as to value and damages was based on hearsay testimony supplied them by others, and not on personal knowledge based on inspection of the property and that such testimony should have been stricken as hearsay.

It should first be noted that although defendants now contend that the testimony of three witnesses should have been stricken, the record reveals that defendants only moved to strike the testimony of the witnesses Swan and Grant at the trial of the case. We will therefore limit our consideration to the correctness of the court's ruling in refusing to strike the testimony of the witnesses Swan and Grant.

The record reveals that these two witnesses are qualified real estate experts and that their testimony concerned their opinions as to the value of the land in controversy. Defendants' complaint as to their testimony apparently goes to the fact that they were asked some questions in which they were required to assume a certain state of facts to be true and to give an opinion accordingly and in other questions they were asked if they had heard certain testimony given by other witnesses concerning certain matters in controversy and upon answering that they had, were then asked to state their opinion as to the value of the land based on the information gained from the testimony of the other witnesses. Defendants say that these witnesses' testimony was therefore based on hearsay and should be excluded. If it be conceded that the testimony of these two experts was based at least partially on hearsay, still it does

not necessarily follow that such testimony was inadmissible. Strictly speaking, practically all expert testimony is based at least in part upon hearsay. We have previously held that it is proper to ask an expert witness a hypothetical question based on other evidence in the case and that it is also proper to outline to an expert witness the testimony of other witnesses for the purpose of basing a hypothetical question thereon. De Camp v. Comerford, 134 Okl. 145, 272 P. 475; Shawnee Gas & Electric Co. v. Hunt, 32 Okl. 261, 122 P. 673. An expert witness may also be asked for an opinion based upon the assumption that testimony given by other witnesses is true. Colley v. Sapp, 44 Okl. 16, 142 P. 989, and see also the annotation at 82 A. L. R. 1460. Almost the identical question was before the United States Court of Appeals for the Tenth Circuit in the case of H. & H. Supply Co. v. United States, 194 F. 2d 553, wherein the court said:

> "It may be conceded, as contended, that both Dooley and Sidwell relied in part upon hearsay sources in reaching their conclusions as to value, but this does not make their testimony as to value inadmissible. The rule is well established that an expert may testify as to value, though his conclusions are based in part, or even entirely, upon hearsay evidence."

We therefore conclude that the court did not err in refusing to strike the testimony of the two expert witnesses.

Defendants' final contention is that plaintiff's petition is fatally defective because it seeks to condemn certain "temporary grants for the purpose of opening stream channels." Defendants' chief complaint in this regard seems to be that the petition fails to state the length of time for which such temporary grant is to be taken. It is quite clear from plaintiff's petition that it was necessary in connection with the construction of the turnpike to go on to certain lands belonging to defendants and open certain stream channels. The land on which it was necessary to open such stream channels is specifically and accurately described by

metes and bounds and is also platted on a map attached to the petition. There is left no room for doubt as to exactly what plaintiff proposes to do and where it proposes to do it. We regard that as being all the information necessary in order to enable the parties to litigate the question of how much plaintiff shall be required to pay defendants for the right to open such stream channels. If, as defendants contend, it is necessary to know the length of time that will be required to open such stream channels in order to determine the value of such right, then reference may be had to the construction contract which was introduced in evidence and which indicated that the contractor had agreed to complete the work within 150 working days. Obviously this is all the information plaintiff could possibly give in this connection. To require more would be to require the physically impossible. We are of the opinion and hold that plaintiff's petition is sufficient under the circumstances and that the court did not err in overruling defendants' motion to dismiss it.

Judgment affirmed.

November 15, 1954

MEMORANDUM

On the 8th day of November, 1954, the Supreme Court went on record as opposing the granting of any additional time in which to file petitions for rehearings, other than allowed by the rules of the Court, due to the fact that there will be a change in the Court on the second Monday in January. The Court wants to dispose of all cases in which opinions have been adopted before that date.

HARRY L. S. HALLEY,
Chief Justice.

INDEX.

PAGE

Petition for Rehearing 1

Discussion 6

(1) Refusal of the Courts of Oklahoma to allow appellants to defend against the taking of their property for an alleged public use (a well established legal right under the XIV Amendment and Oklahoma law).. 6

(2) Refusal of the Courts of Oklahoma to allow appellants to introduce evidence regarding the value of their property for a certain use to which it was adaptable and being put 6

TABLE OF CASES.

A. T. & S. F. Ry. Co. v. P. U. C., 346 U. S. 346, 352... 18

A. Backus & Son v. Fort Street Union Depot Co., 169 U. S. 557 .....2, 9, 16, 17

City of Tulsa v. Williams, 100 Okl. 116, 227 Pac. 876.. 8

Garrett v. Moore-McCormick, 317 U. S. 239, 245-246.. 4

Goodin v. Canal Co., 18 Ohio State 169 12

Grand Hydro v. G.R.D.A., 192 Okl. 693, 139 P. 2d 798.. 8, 20

G.R.D.A. v. Grand Hydro, 200 Okl. 159, 201 P. 2d 225, see 335 U. S. 359 .....8, 9, 10, 15, 21

May v. Anderson, 345 U. S. 528..... 5

McCoy v. Union Elevated Ry. Co., 247 U. S. 363..... 17

Mississippi and Rum River Boom Co. v. Patterson, 98 U. S. 403, 407-410 .....11, 12

Myles Salt Co. v. Board of Commrs., 239 U. S. 478 and 484 .....20, 21

Olson v. United States, 292 U. S. 246 .....13, 15, 16

O'Neill v. Leamer, 239 U. S. 244, 249, 251.....19, 20

PAGE

Roberts v. City of New York, 295 U. S. 264, 277, 278..17,18
Town of Ames v. Wybrant, 203 Okl. 307, 220 P. 2d 693. 8
United States v. John J. Felin & Co., 334 U. S. 624.... 7,8
Wrightsman v. Southwestern Natural Gas Co., 173 Okl. 75, 46 P. 2d 925..... 8
Young v. Harison, 17 Ga. 30..... 12

STATUTES.

United States Constitution,
Fourteenth Amendment.....4,6,16,21
Fifth Amendment..... 16
Okla. Stats. 1951, Title 69, Sec. 658 (Laws 1947)..... 8,14
U. S. C., Title 28, Sec. 1257 (2) or 1257 (3)..... 5
U. S. C. A., Title 28, Sec. 2103..... 5
U. S. C., Title 28 (Supp. V), Sec. 2103..... 5
U. S. C. A., Title 40, Sec. 258A..... 10

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1955.

No. 415

C. E. OWENS, MRS. C. E. OWENS, O. O. OWENS and NABOB OIL COMPANY, *Appellants,*

vs.

OKLAHOMA TURNPIKE AUTHORITY, *Appellee.*

PETITION *for* REHEARING.

Comes now C. E. Owens, Mrs. C. E. Owens, O. O. Owens and Nabob Oil Company, appellants above named, and present this, their petition for rehearing of the above entitled cause, with respect to the decision of November 14, 1955, and in support thereof, respectfully show:

1. The Court failed to observe the presence of a substantial Federal question in the jurisdictional statement, as supplemented by the designated portions of the record included in the transcript.

2. The Court erred in failing to reverse the final judgment of the Oklahoma court for deciding appellants' substantive rights under the Federal Constitution on procedural basis. Substantial Federal Questions are presented in the appeal arising from the refusal of the Oklahoma court to proceed in such manner that all of appellants' substantial rights under controlling Federal law would be protected.

3. The issues presented are not ones that involve the correctness of the trial court's ruling on the weight of the evidence. The issues presented to this Court in-

volve a final judgment of the Oklahoma court refusing to allow evidence to be introduced.

There is too much substance involved in this matter in the nature of legal principles and in material substance to accept the Court's decision without an earnest effort to procure the withdrawal thereof and the further consideration of the appeal on the merits.

Since the Court in *A. Backus & Son* v. *Fort Street Union Depot Company,* 169 U. S. 557, said:

> "It is also not open to further debate, since the decision in *Chicago, Burlington & Q. R. R. Co.* v. *Chicago,* 166 U. S. 226 (41:979), that this court may examine proceedings had in a state court, under state authority, for the appropriation of private property to public purposes, so far as to inquire whether that court prescribed any rule of law in disregard of the owner's right to just compensation. But in this respect we quote the restriction placed in the opinion then filed (p. 246 (41:988)):
>
> > 'We say, "in absolute disregard of the company's right to just compensation," because we do not wish to be understood as holding that every order or ruling of the state court in a case like this may be reviewed here, notwithstanding our jurisdiction, for some purposes, is beyond question. Many matters may occur in the progress of such cases that do not necessarily involve, in any substantial sense, the Federal right alleged to have been denied; and in respect of such matters, that which is done or omitted to be done by the state court may constitute only error in the administration of the law under which the proceedings were instituted.'
>
> While in cases of this kind coming from the Supreme Court of a state, questions of fact passed upon in the state courts are not here open to review (*Egan* v. *Hart,*

> 165 U. S. 188 (41:680), and *cases cited in the opinion), it may not be inappropriate to notice that the award of compensation as finally sustained gave to the respondents the sum of $63,000. As the valuation they placed upon the plant, outside of the realty, was only $150,000, and of the realty the like sum of $150,000, though the realty cost in 1871 less than $30,000, and as none of the ground upon which the plant stood and the business was carried on was taken by the Depot Company, but only the use of the street in front thereof, and that not so as to exclude them from its use, it is obvious that the award, whether adequate or not, was not one in reckless disregard of their rights,"

it has never been doubted that this Court has jurisdiction of the issues presented. We observe three statements in the foregoing quotation that support our position:

First. The proceedings had in a state court for the appropriation of private property to public use may be reviewed by the court to see whether any rule has been prescribed or applied in disregard of a landowner's right to just compensation.

Our contention is, and we believe it is perfectly obvious, we were denied the right to introduce evidence regarding the value of our land when considered in the light of all of its uses. Decisions of the Court are cited and discussed hereinafter on this point.

Secondly. The Court, in the *Backus* case, was of the view that since the land was appraised at most at $300,000, and only the use of the street in front of the plant was being taken whereas the judgment was for $63,000, that no glaring inadequacy was seen.

In our case there is a physical invasion of and taking of land. The land had a useful value for one purpose of

not less than $5,163,250, fixed by the only agency of the law that was permitted to hear all of the evidence. Petitioners were awarded $23,400 by a jury that heard only part of the evidence. We say the difference between the two sets of figures is glaring and obviously arose from something more substantial than weighing evidence.

Thirdly. This denial of right to us is something more than an error done in the administration of the law.

In respect of this appeal, the Court should also consider *Garrett* v. *Moore-McCormick,* 317 U. S. 239. In that case the plaintiff's right was based on Federal statute but certainly is not of more significance than the right to "just compensation" under the XIV Amendment. After a jury verdict, which the trial court overrode by granting judgment *non obstante veredicto,* the Supreme Court of Pennsylvania affirmed on the theory that the judgment of the trial court was based on procedural rather than substantive right.

The final judgment of the Oklahoma court is to the same effect. Its opinion clearly regards the right to introduce evidence and to have a full and candid hearing as purely procedural and as not burdened with any question of substantive rights.

We quote from 317 U. S. 239, at 245-246:

> "'So here in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling Federal law would be protected. Whether it did so raises a Federal question reviewable *here."

Petitioners' method of presentation undoubtedly was faulty, and in this particular. We regarded the jurisdictional statement form outlined in the rules as a "bare-bones" frame or outline of what our presentation would

be in our brief and argument later—that is: after jurisdiction was acknowledged. Our material in our jurisdictional statement is a "dry-as-dust" recital of the material justifying the taking of the appeal and arousing the attention of the Court to the substantial issues involved. Our conception of what is called for in the jurisdictional statement is an outline, without the argument or contentious material in a brief.

We further had the idea that our appeal would also be considered from the standpoint of certiorari as provided by statute, 28 U.S.C.A. 2103, and as exemplified by *May* v. *Anderson,* 345 U. S. 528, "on appeal to this Court, we noted probable jurisdiction. Inasmuch, however, as neither the Court of Appeals nor the Supreme Court of Ohio relied upon the Ohio statute alleged to be the basis of the appeal, we have treated the appeal as a petition for a writ of certiorari, granted it pursuant to 28 U.S.C. (Supp. V), Sec. 2103, * * *."

We may have given the Court the impression that the effect of the decision of the Oklahoma Court was limited to us and our property. Such is not the case. Turnpike's toll roads are becoming general in Oklahoma and are and will cross lands in rural areas capable of use other than farming and grazing. Surely the capacity of these lands for other uses will be present, and can be developed. Just as surely Turnpike should not be authorized to take these lands on the basis of their least valuable use.

Whether our right to have the decision of the Oklahoma Court reviewed is due us under 28 U.S.C. 1257 (2) or 1257 (3), petitioners have and do present to the Court an undoubted right to review. An Oklahoma statute has been construed (we think consciously) to deprive us of "due

process" of law. Turnpike has exercised the power of eminent domain granted to it by this statute, and the courts of Oklahoma have allowed Turnpike to exercise this power in a manner to deny petitioners "just compensation."

DISCUSSION.

Our appeal having been dismissed "for want of a substantial question," we address ourselves in this petition for rehearing to that part of our statement on appeal covered by *"statement of the grounds upon which it is contended the Federal questions involved are substantial."*

The two questions arise from and involve the refusal of the courts of Oklahoma,

(1) **to allow appellants to defend against the taking of their property for an alleged public use (a well established legal right under the XIV Amendment and Oklahoma law), and**

(2) **to allow appellants to introduce evidence regarding the value of their property for a certain use to which it was adaptable and being put.**

The value of appellants' property taken and destroyed was in the millions. $5,163,250.00 is the damage one Board of Commissioners found done to appellants. This board heard and considered the evidence rejected by the courts. $40,000.00 was the damage found by a subsequent board of appraisers, and $23,400.00 was the damage fixed by the jury at the trial—both of whom were denied the evidence appellants offered, had the right to introduce—and, which appellants had introduced at earlier steps in the proceeding.

Thus it is obvious that the admission or rejection of appellants' evidence made a difference in the awards of

more than $5,000,000.00. This is substantial in so far as the subject matter of the federal issues is concerned. The answer sought was the value of what we lost, *United States* v. *John J. Felin & Co.*, 334 U. S. 624.

The damage done to appellants is real. The adaptability of their property for this use was never questioned. Appellants had been warned away from dam-site No. 1, which was 60% complete. They were actually engaged in the construction of dam-site No. 2. The relocation of the toll road to cross dam-site No. 2, after appellants had moved from dam-site No. 1, was done in aggravated form in this: West of dam-site No. 2 the toll road was given a turn to the north, and east of appellants' land the angle of turn was reversed. This then is the appearance of dead aim at our dam-site No. 2. Had the toll road continued without these changes of direction, appellants dam-site would not have been touched, and the value of their land thus taken would not have much exceeded the damage found by the jury.

The locating of this toll road thus, when the locating of it 500 feet to the south would have preserved appellants' valuable property, should be taken into account along with the refusal of Turnpike to pay $5,163,250.00 into court as a condition to taking possession. Turnpike announced in open hearing it would not pay $5,163,250.00 for this right of way across appellants' dam site and lake sites. The alternative to this was again moving or re-locating the road, unless Turnpike could persuade a court—which it did—to limit appellants' evidence of value. Locating the road 500 feet south of dam-sites No. 2 and No. 3 would have left appellants comparatively undamaged.

When the Board of Commissioners fully informed (both appellants and Turnpike offered evidence) fixed damage at

$5,163,250.00 and Turnpike refused to pay such sum, and when thereafter another Board of Commissioners and later a jury, who were denied evidence on the value of an adaptable use, fixed damage at less than $50,000.00, appellants lost more than $5,113,250.00, and Turnpike gained a like sum. This enormous loss by appellants and gain for Turnpike turned solely on the denial of appellants' federal constitutional rights by the courts of Oklahoma. *United States* v. *John J. Felin & Co.*, 334 U. S. 634.

This result arises from the interpretation and application of 69 O. S. A. 1951, Section 658 (Laws 1947). The statute directs that Turnpike have and exercise the power of eminent domain according to the laws of Oklahoma—that is: the laws of Oklahoma sbstantive and procedural. We are not concerned with the procedural forms.

Prior to and subsequent to the decision which we seek to have reviewed the statutory and court law of Oklahoma on the substantive side provided for all landowners (*1*) the right to resist the taking of their property for an alleged public use by asserting a number of legal and factual defenses (*City of Tulsa* v. *Williams*, 100 Okl. 116, 227 Pac. 876; *Wrightsman* v. *Southwestern Natural Gas Company*, 173 Okl. 75, 46 P. 2d 925; and *Town of Ames* v. *Wybrant*, 203 Okl. 307, 220 P. 2d 693), and (*2*) the right to introduce evidence (on the trial of the issue of just compensation) of its adaptability to various uses to establish its value (*Grand Hydro* v. *G.R.D.A.*, 192 Okl. 693, 139 P. 2d 798, and *G.R.D.A.* v. *Grand Hydro*, 200 Okl. 159, 201 P. 2d 225, see 335 U. S. 359). Both of these rights are very definitely protected by the Federal Constitution. In so far as the decision of the Oklahoma court now under attack goes, it did not change the existing Oklahoma law as outlined above

so that what is now being complained about to this Court is not a change of viewpoint by a state court. But, the decision does change the existing Oklahoma law as to these parties, and as to any other parties who now or may hereafter occupy appellants' situation as against Turnpike. See *A. Backus & Son* v. *Fort Street Union Depot Company,* 169 U. S. 571.

The legal rights granted to other landowners and denied to appellants are valuable rights and substantial rights. They are founded upon substance and not upon mere forms or procedures. The statute involved does not on its face undertake to do what the Oklahoma courts have said it does; and we assert that had the statute in terms provided for such a result by specifically providing that landowners whose land was sought by Turnpike could not assert the legal defenses above mentioned, and on the issue of the value of the land to be taken could not show that the land had any value other than "rural land" it would undoubtedly be held to take away from the landowners substantive rights, and to be unconstitutional. The Supreme Court of the United States quoted with approval in 335 U. S. 369, the language of the Oklahoma Court in *G.R.D.A.* v. *Grand Hydro,* 200 Okl. 157, 201 P. 2d 225, 228:

> "The state cannot, through its law-making body, remove the principal value of private property, and, through its established agency acquire the property by condemnation, basing the reimbursement to the owner on the reduced value."

That is exactly what is being done here in our case. A substantial federal question is thus raised. The application of the statute by court decision to do what the statute does not in terms do cannot be less substantial in effect. The

denial of due process to appellants is as complete under the decision to be reviewed as if the statute had so said.

The parallel between this situation and the one involved in *G.R.D.A.* v. *Grand Hydro* is close. G.R.D.A. is an agency created by the Legislature of Oklahoma to conserve water resources, etc., and it undertook to acquire land for a dam site. In the trial on the issue of compensation, G.R.D.A. succeeded in having the trial court withdraw from the jury evidence given by Grand Hydro of the value of this land as a dam site. This ruling was based on the assumption that Grand Hydro could never use the land for that purpose. The verdict without this evidence fixed the compensation at $140,000.00, whereas on retrial with this evidence considered by the jury the verdict was $850,000.00. The Supreme Court of Oklahoma held (and the Supreme Court of the United States later approved) that evidence must be received of all possible, reasonable uses of land in order to fix compensation.

It is almost inconceivable that eminent domain on behalf of the federal government, with a statement of taking under 40 U. S. C. A. 258A on file, could be attacked as not being for a public use, and perhaps this is true as to any agency created by the Congress and declared to be for the public use. But, the Congress does authorize bodies corporate such as the Red Cross, foundations, patriotic societies and the like, to whom it does not give the power of eminent domain. It therefore can be questioned in the courts that the power of eminent domain can be conferred on them. We assert it would be a substantial *right* denied if the Congress in creating them and vesting in them such power had forbidden any property owner, whose property was being taken, a defense of law or fact against the taking of his property and had also provided that in establishing the

value of the property thus taken no account should be noted of its value except for its then residential use or farming use or some use of nominal value.

Let us offer this illustration of what has happened here. In Oklahoma the law is that a condemnor must negotiate with the landowner in an effort to buy the land before resorting to condemnation. In this case Turnpike not only made no effort but refused to negotiate, obviously because of the tremendous value of appellants' land and Turnpike's intention to destroy its greatest usefulness and value. At the time Turnpike should have negotiated in good faith, appellants were engaged in constructing dam-site and lake No. 2. The record discloses that had there been negotiations appellants would have fixed a price far in excess of ten million dollars—the value to them of their property for its intended use. Appellants had a perfect right to do this. *Mississippi and Rum River Boom Company* v. *Patterson*, 98 U. S. 403, 407-408, states:

> "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in the sale of property between private parties."

Such a price would not have been arbitrary, nor would it have been based on fictitious factors.

Turnpike chose to confiscate and not to purchase at true value. Turnpike obtained a ruling by a trial court that such intended use and the prospect of successful use therefor were so remote that no evidence could be received that would give any value to this use. Thereby Turnpike has been enabled to take appellants' land without their being able to show the jury its value for its adaptable use. What appellants could rightly negotiate for in trying to arrive at

a fair cash market value, they cannot show to a jury, by a decision of the Oklahoma Court.

There are many cases under the V and XIV Amendments saying about the value of land being taken: "Its capability of being made thus available gives it a market value which can be readily estimated." *Mississippi and Rum River Boom Co.* v. *Patterson,* 98 U. S. 403, 408.

Appellants dam site and lake site were taken as a right of way for a toll road. The courts of Oklahoma say the 35 acres was "rural land" and value it as rural land only. The Supreme Court of the United States cannot find in the opinion of the Supreme Court of Oklahoma by reference or by inference that appellants' land was claimed to have a value for the purposes for which appellants already at great expense were developing their property.

Does the fact appellants were using this land for one purpose and Turnpike desired it for another offer a legal basis for refusing to allow appellants to show its value for their intended use? In the *Mississippi River* case above (98 U. S. 410) is cited *Goodin* v. *Canal Co.,* 18 Ohio State 169, wherein a railroad company was condemning the bed of a canal for its track. The railroad company was trying to limit evidence of the value of the land being taken to its value for use as a canal bed only. The rule of evidence of value was stated thus:

> "* * * valuation was what the interest of the canal company was worth, not for canal purposes or any other particular use, but generally for any, and all uses for which it might be suitable."

In the same decision, 98 U. S. 410, is cited *Young* v. *Harison,* 17 Ga. 30, where land necessary for a bridge abutment was taken, and its value as a site for a bridge was allowed

to be shown (although, contrary to our case, it might never have been so used by the condemnee there). Its value was not limited to its "agricultural or productive" capacities. Appellants' land has been so damaged by Turnpike as to substantially destroy its value.

No question was raised about the capability of appellants' land being used as a dam site, nor that a lake capable of impounding water was in process of construction. These facts stand uncontradicted. The trial judge was of the opinion that appellants' chances of selling impounded water to others was "too remote." Evidence that it could be readily and profitably sold was refused admission.

We have to this point shown that our legal, substantive rights found genesis under the Federal Constitution, we have shown they were denied by the Supreme Court of Oklahoma, and we have shown that these rights are enormously valuable—that is, appellants' loss is in excess of $5,000,000.00. We do not know how else to show that a substantial federal question is involved except to cite similar cases for illustration. Before proceeding to do this, let us make the following comment.

We cannot disassociate this appeal and the rule of law from money. We had property. It had a value that is customarily stated in monetary terms. Appellants' property having been destroyed by Turnpike, they are now entitled to money that is its full and exact equivalent. "That equivalent is the market value of the property at the time of the taking contemporaneously paid in money." *Olson* v. *United States,* 292 U. S. 246.

The only manner in which value is ever fixed in condemnation cases is in terms of money. We are fully aware that the Court does not regard the amount of money either

small or enormous (as in this case) as the guiding criterion whether a federal question is substantial. We, therefore, assert that the federal questions we are presenting are substantial whether the loss of value is large or small.

Perhaps the next landowner who complains of this application of this particular statute may have a tract of land lying in a rural area that has a capability easily worth $5,000.00, whereas its agricultural value may not exceed $500.00. Perhaps another may own an unimproved city lot but will be unable to show its value as a building site because the trial judge, with approval of the Supreme Court of Oklahoma, may be of the belief it is too remote from business centers to attract tenants. To make it a little closer in fact to us, suppose the owner of the town lot is in the process of constructing his building. The rejection of evidence of its value as an office building would be highly prejudicial. In such an instance, a judgment of the Oklahoma Court as applied to Turnpike under 69 O. S. A. 1951, Sec. 658, would limit the issue of compensation to agricultural value or vacant lot value alone. However, the rule would be otherwise to other landowners and condemnors in Oklahoma.

Also, we cannot leave the Court with the impression that this decision applies to appellants alone, and that our complaint is the only one that can arise. One toll road has been built in Oklahoma, another is under construction, and at least two more are authorized. The opinion of the Oklahoma court now complained of is, and unless set aside will be the rule of law as to compensation where land is condemned under this statute. A class action or status is thus created.

All condemnors in Oklahoma, except Turnpike, are as a matter of legal obligation obliged to negotiate for the

purchase of or to have a jury fix value of land condemned which takes into account its value for all reasonable uses for which it is shown capable. Under the Oklahoma Supreme Court's opinion here attacked, Turnpike can take land for its agricultural value alone, and without any showing of right or need.

All landowners in Oklahoma can require all condemnors in Oklahoma, except Turnpike, to establish as a matter of fact and law their right to exercise the power of eminent domain and the necessity for taking the land as a condition precedent to any steps in condemnation; and, as against all condemnors except Turnpike, can defend in law and fact against the power and necessity for taking their land and have those issues determined before they are dispossessed and the value of their property determined. And, when it is proper to show to a jury the value of their property they can show "* * * not merely values of the property for the use to which it has been applied by the owner * * * but the possibility of its use for all purposes, present and prospective for which it is adapted and to which it may in reason be applied * * *." (*G.R.D.A.* v. *Grand Hydro,* 195 Okl. 693, 139 P. 2d 298, 800, affd. 335 U. S. 359, 367-368.)

This distinction in substantive rights between one condemnor and all others and the difference in legal right between one class of landowners and all others is not to be found elsewhere and is not to be countenanced under the Federal Constitution. This is a greater reason than any other present in our appeal why the questions urged are substantial federal questions.

We refer again to *Olson* v. *United States,* 292 U. S. 246, with full reliance upon its applicability here, to the rule stated:

"The judicial ascertainment of the amount that

shall be paid to the owner of private property taken for public use through exertion of the sovereign power of eminent domain is always a matter of importance for, as said in *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 324, 13 S. Ct. 622, 625, 37 L. ed. 463: 'In any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.' The statement in that opinion (page 326 of 148 U. S., 13 S. Ct. 622, 626) that 'no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner' aptly expresses the scope of the constitutional safeguard against the uncompensated taking or use of private property, for public purposes. *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 326, 399, 14 S. Ct. 1047, 38 L. ed. 1014."

Now, to comparative cases. Although we understand "due process" under the XIV Amendment as it relates to "just compensation" is identical with "just compensation" under the V Amendment, we intend to limit our citation of cases to those involving decisions on state laws.

Also we will cite such cases because they represent rulings by state courts on state statutes that are said to deprive persons of property without "due process" as a result of the language of the statute or the interpretation of the statute by the court. These cases, as well as ours, show not "mere judicial errors" but decisions which can be said to deny the party a trial according to a settled course of judicial proceeding.

Again we cite *Backus* v. *Fort Street Union Depot Company,* 169 U. S. 557, in which a decision of the Michigan court was reviewed to see among other things whether the

current decision holding that compensation should be fixed by a common law jury rather than by a jury of inquest as was formerly the rule offended against constitutional guaranties. This was held procedural and not offensive since opportunity for a full hearing had been afforded. By way of comparison of non-offending and offending rules, the Court said (169 U. S. 571):

> "The question is not presented of a distinct ruling by a state court that one party is entitled to certain rights and the benefits of certain modes of procedure, and that another party similarly situated is not entitled to them. An act of the legislature which in terms gave to one individual certain rights and denied to another similarly situated the same rights might be challenged on the ground of unjust discrimination and a denial of the equal protection of the laws."

In our petition in error and designated record herein we make and sustain that very discrimination.

We refer again to *McCoy* v. *Union Elevated Ry. Co.*, 247 U. S. 363, and without requoting the language of the *Backus* case quoted therein, we do quote the language thereof relating the rule of the case to us:

> "Our concern is not to ascertain whether the rule adopted by the state is the one best supported by reason or authority, nor with mere errors in course of trial, but with denial of a fundamental right."

In that decision it is noted that if the rule of law of the state court has the necessary result to deprive the owner of property without just compensation, then due process has been denied.

Roberts v. *City of New York*, 295 U. S. 264, is again relied upon. We are of the belief that the language, following a recital of various phrasings of the rule regarding

reviews on appeal from the taking of property without due process (277):

> "In condemnation proceedings as in lawsuits generally the Fourteenth Amendment is not a guaranty that a trial shall be devoid of error. *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 63, 70, *ante* 761, 768, 55 S. Ct. 316. To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action."

And (278):

> "Enough for present purposes that when the hearing has been full and candid, there must ordinarily be a showing of something more far-reaching than one of dubious mistake in the appraisal of the evidence,"

applies here and fully justifies the correctness of our effort to obtain a review. Our evidence has not been received in the record, nor been taken into consideration by the jury. Our position is different; it is a case of arbitrary exclusion of our evidence which would sustain our constitutional rights. The exclusion of our evidence in the face of all rules favoring—even requiring its admission—smacks of something more far-reaching than a mere "dubious mistake in the appraisal of the evidence."

In *A., T. & S. F. Ry. Co.* v. *P. U. C.*, 346 U. S. 346, the Court entertained an appeal as involving a substantial federal question. The issues controverted, the rules of law discussed and the effects complained of were of no greater significance or substance than here. The issues of proper allocation of grade separation costs had been before the Court numerous times (cases cited 346 U. S. 352). In that case there was not involved a rejection of evidence touching upon a vital element of allocation. The primary issue

was whether the trial agency had correctly weighed the evidence of the parties in arriving at the allocation. The Court stated the issue:

> "The principal question presented is whether the allocation of the reasonable cost of grade separation improvements is arbitrary as to the railroads * * *."

The principle that a person's property may not be taken for a public use without just compensation applies to taxation, police power, eminent domain or any other governmental exaction, and no scheme under any of these heads which undertakes to force a selected few to carry the burden of promoting the public convenience of the general public can be sustained. Action under any statute or judgment that has such a result should be reviewed and corrected.

The purpose of Oklahoma in creating Turnpike as a quasi-public agency, if that is what it did, was to encourage automobile traffic, to supplement the state road system and implement safety at the cost of toll-payers. When the tolls have paid out a toll road title thereto vests in the State, subject to certain conditions. The less a road costs the sooner tolls will pay it out. Therefore, if Turnpike is enabled to acquire its right of way for less compensation to owners than would be the case if just compensation was paid under "due process," and less than other condemnors pay under similar conditions, appellants and others likewise affected are burdened to promote a supposed public interest in this arbitrary manner. Based on appraisal alone, it is costing appellants nearly $5,163,250.00 to carry the burden in order that Turnpike may progress. We do not know whether such confiscation is for the public interest, because the Oklahoma Court declined to consider this.

We call attention to *O'Neill* v. *Leamer*, 239 U. S. 244, in which this Court, without reference to money or value

in definite terms, entertained an appeal from the Supreme Court of Nebraska to see whether the alleged use for which the property was being taken was public or private. The Court said (249):

> "But we think that the plaintiffs sufficiently raised the question whether the appropriation was essentially for a private purpose, and hence contrary to the 14th Amendment, as amounting to a deprivation of property without due process of law, and that their contention as to their Federal right in this respect was denied by the state court. In this view jurisdiction attached (*Missouri P. R. Co.* v. *Nebraska,* 164 U. S. 403), * * *."

The designated portions of the record which we filed, and as to which Turnpike made no counter-designations and has not said to this Court in any manner that they are incorrect or inadequate, clearly show that the Oklahoma Court is of the opinion that appellants should not be allowed to question whether their property was being taken for public use.

In the *O'Neill* case this Court pointed out that it was assumed that the law of Nebraska is that reclamation projects must involve the public welfare before property can be appropriated therefor, saying (251):

> "Acts with a different purpose have been held unconstitutional."

The Court cannot indulge such an assumption here, for the refusal to allow appellants to question the existence of public interest inhering in the particular Oklahoma Turnpike Act means that the Oklahoma Court regards this character as immaterial.

In *Myles Salt Company* v. *Board of Commissioners,* 239 U. S. 478, the Court reviewed a judgment of the Su-

preme Court of Louisiana sustaining the assessment of drainage benefits, in which appeal it was contended (as it could be here) that the law as written was not offensive to the XIV Amendment, and that the decision of the state court applying it was a state matter without any federal aspect. This was rejected in this language (484):

> "We cannot concur in this contention. It is true the law of the state as written is not attacked, but the law as administered and justified by the Supreme Court of the state is attacked, and it is asserted to be a violation of the Constitution of the United States. The question presented is Federal and the motion to dismiss is denied."

Finally, the Court entertained jurisdiction of *G.R.D.A. v. Grand Hydro,* 35 U. S. 359, after initially denying certiorari to review the very narrow issue of the effect upon just compensation under the Oklahoma law of a federal act. Also, the Federal Government had lent the money from which this compensation was to be paid. In the state courts on first trial, evidence of the value of the land taken for a dam site was admitted and then withdrawn from the jury on the theory that the land had no such value because the owner had no right under state or federal law to build a dam at the place. The Supreme Court of Oklahoma reversed the trial court (192 Okl. 693, 139 P. 2d 798), holding the withdrawal of such evidence gave the owner less than just compensation. On retrial with such evidence in, a much larger value was found. This was approved (201 P. 2d 225) and an appeal to this Court by way of certiorari was first denied and then entertained, limited to the question whether the state rule allowing such value was wrong in view of the federal statute. The Court reviewed and approved the decisions of the Oklahoma Court defining just compensation.

The decision here for review violates grossly and obviously that definition beyond mere judicial error in weighing evidence, and in holding our evidence was wholly inadmissible as relating to an improper element of value.

Wherefore, upon the foregoing grounds, in light of the discussion herein, it is respectfully urged that this petition for rehearing be granted, and that the decision of November 14, 1955, be withdrawn and upon further consideration the final judgment of the Supreme Court of Oklahoma be reversed.

Respectfully submitted,

HARRY D. MORELAND,
1510 Nat'l Bk. of Tulsa Bldg,
Tulsa 3, Oklahoma,
Attorney for Appellants.

Of Counsel:
E. J. DOERNER,
THEODORE RINEHART,
HAROLD C. STUART,
SAM CLAMMER,
JACK E. CAMPBELL,
DICKSON M. SAUNDERS,
1510 Nat'l Bk. of Tulsa Bldg.,
Tulsa 3, Oklahoma,
and
1001 Connecticut Ave., N. W.,
Washington 1, D. C.